

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3962 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

GHELUBHAI R MADAM THRO' HEIRS AND LEGAL REPRES.

Versus

AK MEHTA OR SUCCESSOR COMPT AUTHORITY AND SAFEMA/

Appearance:

1. Special Civil Application No. 3962 of 1999
MR RS SANJANWALA for Petitioner No. 1-1/5
Mr Dhaval Barot Addl.Central Govt.Standing Counsel
for Respondent No. 1,3
Mr A D Oza, G.P. for the State of Gujarat
-

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 22/04/2004

ORAL JUDGEMENT

The petitioners above named have preferred this

petition under Article 226 of the Constitution of India for appropriate writ, order or direction for quashing and setting aside the impugned order dated 25.8.1975 passed against the detenu and placed at Annexure 'A' to the petition. The petitioners have also prayed for appropriate writ order or direction for quashing and setting aside a notice issued under section 6 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (for short, 'SAFEMA') placed at Annexure 'B' to the petition and also an order passed on 29.6.1998 under section 7 of the SAFEMA.

2. The facts leading to the present petition can be briefly stated as follows:

A declaration under section 12-A of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for Short, 'COFEPOSA') was made about detenu-Hemantbhai R Madam on 25.8.1975 placed at Annexure 'B'. The said declaration was made in exercise of power under section 12-A of the COFEPOSA Act on the ground that it was necessary to detain the said detenu for effectively dealing with emergency. It seems that the emergency was lifted on 25th March, 1977 and on account of the said position, persons under detention, in exercise of the powers under section 12-A of the said Act were released from detention. Accordingly, by order dated 25.3.1977, the said detenu came to be released from detention under wireless messages received from the appropriate authority. Therefore, the said detenu was not required to undergo the entire period of detention as required by the said provisions of law. In other words, the order of detention was revoked on lifting of Emergency period during which the detention and the detention order were in existence. In other words the detenu was not required to remain under the detention for the entire period for which the order was passed i.e. for 12 years. Thereafter, notice under section 6 was issued against the deceased and the family members of the said detenu on the basis of the aforesaid detention order passed against the said detenu, though it was subsequently revoked as aforesaid on 25.3.1977. It appears that by filing Special Civil Application being Special Civil Application No.125/77, the said detenu had challenged the order of his detention before this Court. However, on 9.8.1994, the said petition came to be dismissed in terms of the order passed by this court.

3. Then on 25.8.1994, the competent authority issued notice under section 6(1) of the COFEPOSA to the heirs and the legal representatives of the deceased as the

deceased has already passed away by that time. On 29.6.1998, an order was passed under section 7 of the SAFEMA. The property of the deceased was forfeited to the State under the said order. The petitioners have challenged the aforesaid orders of the respondent. It has been mainly contended here that the proceedings under the SAFEMA are not maintainable in view of the position that the detention order dated 25.8.1975 at page 17 to the petition had already been revoked on 25.3.1977 as said hereinabove. That since the order of detention was revoked, there was no question of commencing or continuing the proceedings under section 6(1) and 7 of the SAFEMA against the present petitioner. That therefore, in absence of a valid existing detention order under the COFEPOSA, the competent authority had no power, function, authority or jurisdiction to proceed against the petitioners under section 6(1) of the SAFEMA and, therefore, there could not be any order under section 7 of the said Act against the petitioners. That therefore, initiation of proceedings under section 6(1) and the order under section 7 of the said Act are both illegal and deserve to be quashed and set aside.

4. The petitioners have challenged the aforesaid detention order also.

5. It has also been contended that the detention order was passed without formulating grounds for the detention. That though they were not required to be communicated to the petitioners or to the detenu during the life time of emergency, it was obligatory on the part of the competent authority to formulate grounds for passing the order of detention against the detenu. That therefore, without formulation of grounds, the order of detention could not have been passed and, therefore, the order of detention is illegal on that count also.

6. It has also been contended that once the proclamation of Emergency was lifted, the competent authority was required to supply grounds of detention to the detenu and since the grounds have not been communicated to the detenu after lifting of Emergency, the further proceedings under sections 6 and 7 of the SAFEMA were illegal. It has also been contended that the detention order or grounds of detention did not convey information to the detenu that he had a right to submit effective representation to a particular authority or authorities. That therefore, the detenu was not aware of his right of submission of effective representation under Article 22 (5) of the Constitution and, therefore, also the order of detention is illegal. That under the

provisions of COFEPOSA, appropriate authority is required to review the order of detention from time to time. That in the present case, this process was not undertaken within the stipulated period and, therefore, also the order of detention is not valid or legal.

7. It has also been contended that a copy of the order of detention and grounds of detention were not supplied to the petitioners when the proceedings were undertaken under section 6(1) of the SAFEMA. That therefore, the petitioners were not aware of the detention order and the grounds of detention recorded by the competent authority and, therefore, the petitioners could not make effective representation or could not effectively deal with the said issue in proceeding under section 6(1) of the said Act and, therefore, there was clear violation of principles of natural justice and, therefore, also the order under section 6 of the SAFEMA is not legal and valid. It has also been contended that the order of detention was passed after unexplained inordinate delay which would show that the competent authority was not required to immediately detain the detenu and, therefore, because of the said inordinate delay, the order of detention is not legal and valid. That even otherwise, the order of detention is not legal and valid and it deserves to be set aside. On the strength of the aforesaid contentions, the petitioners had preferred this petition before this court for quashing and setting aside the proceedings under section 6 and order under section 7 of SAFEMA and the order of detention under COFEPOSA against the detenu.

8. On receiving the petition, rule was issued and in response to the service of notice of rule, Mr Dhaval Barot, learned Addl. Central Government Standing Counsel has appeared for respondents no.1 and 3 and Mr A D Oza, learned Government Pleader has appeared for the State of Gujarat. On behalf of Union of India and the competent authority, the learned Counsel has submitted affidavit of Dy. Director of office of respondent no.2 at page 90 onwards. Certain documents have also been produced along with the said affidavit. They are taken on record.

9. At the stage of final hearing, the learned Sr. Advocate for the petitioner has argued at length that the order of detention is not legal and even the proceedings under the SAFEMA are not legal.

In support of the said contention, he has narrated the facts situation which has already been referred hereinabove. For the sake of convenience, it

may be reproduced for ready reference as under:

- i. 25.8.1975 Detention against Hemantbhai R Madam and declaration under section 12-A of the COFEPOSA against the detenu.
- ii. 25.3.77 emergency was lifted and the detenu was released from detention.
- iii. 1977 The detenu challenged the order of detention by filing Special Civil Application No.125/77 before this Court.
- iv. 9.8.1994 Above petition was dismissed with other similarly situated petitions.
- v. 25.8.1995 Proceedings under section 6(1) against the petitioners.
- vi. 29.6.1998 Order under section 7 of SAFEMA against the petitioners.

10. It is, therefore, not in dispute that though an order of detention was passed against detenu-Hemant R Madam, the said order came to be revoked or withdrawn by subsequent order when the Emergency was lifted on 25.3.1977. This fact has not been seriously disputed by or on behalf of the respondents.

11. It has, therefore, been contended by the learned Sr.Counsel for the petitioner that when the order of detention was revoked or withdrawn then in that event, the proceedings under section 6 (1) of the SAFEMA could not have been undertaken by the competent authority.

12. On the other hand, Mr Dhaval Barot, learned Addl.Central Govt.Counsel for the contesting respondent makes it clear that for proceedings against any person under section 6(1) of the SAFEMA, an order of detention under the COFEPOSA is sine quo non. In other words, it is his contention that before passing an order under section 7 of SAFEMA and before proceeding under section 6(1) of SAFEMA, an order under the COFEPOSA for the detention of the detenu is a basic requirement. He also agrees that if no order has been passed under COFEPOSA for the detention of the detenu then in that event, the proceedings under section 6(1) cannot be vitiated or an order under section 7 of the said Act can also not be passed. In other words, an order of detention under the provisions of COFEPOSA is a basic requirement for

proceedings against any person under the provisions of SAFEMA.

13. In the present case, it is not much in dispute that though the order of detention was passed against the detenu, the said order came to be withdrawn and the detenu came to be released from detention when the Emergency was lifted. On the strength of the above facts situation, the learned Sr.Counsel for the petitioner has argued at length that when the order of detention was not in existence at the relevant point of time, the competent authority could not have proceeded under section 6(1) of SAFEMA against the present petitioners. In order to understand the position, it may be stated here that Ghelubhai R Madam and Hemantbhai R Madam were real brothers. An order of detention referred to hereinabove was passed against Hemantbhai Madam and proceedings under section 6 of the SAFEMA had commenced against Ghelubhai Madam. However, in between Ghelubhai Madam passed away and, therefore, fresh proceedings were initiated against the present petitioners. Incidentally, it may be noted that petitioner no.1 Ramilaben is the widow of deceased Ghelubhai Madam whereas other petitioners No.2,3,4 and 5 are sons of deceased Ghelubhai Madam. These facts are not dispute before this Court.

14. The learned Addl.Central Govt.Standing Counsel has contended that in the present case, the order of detention was withdrawn because the emergency was lifted. However, it is also his argument that the substantive petition filed by the detenu challenging his detention was dismissed by this court and, therefore, when the said petition was dismissed on merit, the present petition filed by the present petitioners would not lie.

15. It is required to be considered here that so far as the earlier petition is concerned, Special Civil Application No.125/77 came to be dismissed by this court in view of the position that in the said earlier petition, the challenge was to COFEPOSA as well as to the SAFEMA as contended by the learned Sr.Counsel for the petitioner. It has also been contended by him that on account of pronouncement of the decision in the case of Attorney General for India v. Amratlal Pranjivandas & Ors. (1995) 5 SCC 54, the constitutional validity of the said two Enactments was upheld. It is also the argument of the learned Sr.Counsel for the petitioner that the detenu in the earlier petition, had challenged the constitutional validity of the said two enactments but when the Hon'ble the Supreme Court had dealt with and decided the said issue and when the said issue was

finally brought at rest by upholding the constitutional validity of the enactments, the said two issues could not be dealt with and decided by this court and, therefore, on account of the aforesaid pronouncement of the Supreme Court in the aforesaid decision, the petition filed by the detenu being Special Civil Application No.125/77 came to be dismissed under order of this Court. The said fact is also is not much in dispute. However, the learned Addl. Central Government Standing Counsel for the Union of India has argued that the said order of this Court should be treated to be an order on merit and, therefore, when the detention order was confirmed and the petition challenging the detention order was dismissed on merit, the present petition would not fall in terms of the aforesaid pronouncement of (1994) 5 SCC 52 (supra).

16. Now copy of the order passed by this court can be gathered at page 81. It is a short order which is reproduced for ready reference as under:

"Special Civil Application No.125/1978

ORAL ORDER (Per. B N Kirpal, C.J.)

In view of the decision of the Supreme Court in the case of Attorney General of India v. Amratlal Pranjivandas & Ors. reported in Judgment today 1994 (3) S.C. 583, this petition is dismissed."

On a bare reading of the aforesaid order, it becomes very clear that this court had not dealt with and decided numerous issues which had arisen in the aforesaid petition. The order itself makes it clear that the petition was dismissed on account of the decision of the Supreme Court in the case of Attorney General for India (supra). Therefore, it has to be accepted that the earlier petition of the detenu was not disposed of on merit and, therefore, it would not be open to the Union of India or to the State of Gujarat to argue that since the earlier petition was disposed of on merit and since the detention order was confirmed, the present petition would not lie.

17. It has also been argued on behalf of the respondents that while dismissing the earlier petition, no reservation was made in favour of the petitioners. In other words, the argument is that the right of the detenu for filing fresh petition was not kept alive or reserved by the order of this Court. This fact cannot be disputed. However, a right to file fresh petition can be

reserved more particularly when the petition is sought to be withdrawn. Now in the present case, the earlier petition was not withdrawn by the detenu or by the petitioners. In the said petition, the petition came to be dismissed under the order of this court. Therefore, when the order was passed by the court itself, then in that event, the Court may not mention in its order that the petition was being dismissed reserving the right of the petitioner to file fresh petition.

18. Even otherwise, the earlier petition was simply filed for the purpose of challenging the aforesaid two enactments namely; COFEPOSA and SAFEMA. There the order of detention was challenged on the ground that the aforesaid two enactments were not constitutionally valid. The detention order was not challenged on its on fact.

19. The learned Addl. Central Government Standing Counsel argues that the earlier petition was filed challenging the factual merit of the detention order. However, the copy of the said petition is not on record and, therefore, it becomes difficult for this court to verify the position and to state the correct position on record. Any way it becomes clear that the earlier petition was dismissed on a solitary consideration that in the case of Attorney General of India (supra), the Supreme Court had decided in favour of the constitutional validity of the aforesaid two enactments. Therefore, the said petition did not survive. This would clearly show that this court had not applied its mind to the factual dispute which might have arisen in the earlier petition.

20. Therefore, when the earlier petition was not decided on merit, then in that case, it cannot be said that the second petition challenging the factual merit would not lie. In this aspect of the case, it would be relevant to refer to certain decisions also.

20.1. In the case of International Wollen Mills v. Standard Wool (U.K.) Ltd. reported in 2001 (5) SCC 265, the matter related to the principles of res judicata under section 11 of the Civil Procedure Code, 1908. Here the court had passed decree in favour of the plaintiff after considering the plaint filed by the plaintiff. Though it was termed as a decree on merit, it was observed that no evidence was recorded but the decree was passed in presence of defendants and, therefore, it could not be termed as decree on merit and, therefore, a second proceeding would not be barred by the principles of res judicata under section 11 of the Code of Civil Procedure.

20.2. The learned Addl. Central Govt. Standing Counsel for the Union of India has also argued that in view of the decision of Attorney General of India (supra) referred to hereinabove also the present petition of the petitioner is not maintainable. For this purpose, he has referred to the observations of the Supreme Court in para 42 of the said judgment. There it has been observed as follows:

"The validity of an order of detention to which section 12-A of COFEPOSA applied, could yet be examined even during the emergency on the touchstone of the law as it obtained during the operation of the Presidential Order under Article 359(1)-say on the ground that the provisions of section 12-A were not complied with, or on other grounds, as may not have barred during the said period. But a person who could have so challenged the order of detention and yet chose not to do, cannot be allowed to do so when such an order of detention is made the basis for applying SAFEMA to him - this is for the reason that even if he is allowed to challenge the said order when he is served with the notice under section 6 of SAFEMA, the challenge has to be examined with reference to the position of law as was obtaining at the time the said order was made and the law in force during the period the said order of detention was in operation. Same would be the position in the case of a person who challenged the order but failed in his challenge. Even in the case of a normal order of detention under COFEPOSA, the position would be the same. A person who did not challenge (either by himself or through his next friend) the order of detention or challenged it but failed, cannot be allowed to challenge the order of detention when action is taken against him under SAFEMA.

Thus, the conclusion is that an order of detention to which section 12-A is applicable as well as an order of detention to which section 12-A was not applicable can serve as the foundation, as the basis, for applying SAFEMA to such detenu and to his relatives and associates provided such order of detention does not attract any of the sub-clauses in the proviso to section 2(2)(b). If such detenu did not choose to question the said detention (either by himself or through his next friend) before the Court during the period when such order of detention was in

force, - or is unsuccessful in his attack thereon
- he, or his relatives and associates cannot
attack or question its validity when it is made
the basis for applying SAFEMA to him or to his
relatives or associates."

Thus, it can be seen that the order of detention to which section 12-A of COFEPOSA applies, the validity thereof can be examined during the Emergency period on the ground other than those barred during the emergency operation, if the said challenge has not been made or such challenge has been made unsuccessfully then on a subsequent challenge to the order of detention could not be undertaken when the proceedings under section 6(1) have been initiated.

21. In the present case, we find that the said observation will not be helpful to the present respondents. The reason is that as per the case of the petitioners the detenu had challenged the order of detention only on the ground that the COFEPOSA and SAFEMA were not constitutionally valid and, therefore, the order of detention was not valid and legal. Therefore, according to the argument of the learned Advocate for the petitioner, the earlier petition did not challenge the factual merits of the detention order and therefore, subsequent petition would not be a bar. When the aforesaid objections have been raised on behalf of the respondents, when the copy of the earlier petition has not been produced on record. It would be difficult for this court to hold that the earlier petition also contains challenge to the factual merit of the detention order and, therefore, it would be difficult to accept the arguments of the learned Standing Counsel that the second petition challenging the factual merit of the detention is not maintainable.

22. It has also been argued by the learned Sr.Counsel for the petitioner that an order of COFEPOSA for the detention of a detenu is a sine qua non for passing an order under SAFEMA and also for proceeding under section 6(1) thereof. This legal proposition has not been disputed at any point of time. Therefore, an order of detention has become an accepted basic requirement for passing an order under section 7 of the SAFEMA. In this connection we may refer to a decision in the case of Karimaben K Bagad v. State of Gujarat, reported in AIR 1998 SC 2938. There it has been clearly laid down that a valid order of detention is a condition precedent for proceeding under section 6 of SAFEMA. There the order of detention was passed on 25.2.1997. The said order was

challenged by filing a writ petition being Special Criminal Application No.101/77. The order of detention came to be withdrawn on lifting of emergency. The petition was ordered to be disposed of on 8.8.1977 on the ground that the said detention order was revoked and the petition did not survive. Thereafter the proceedings had commenced under section 6(1) of SAFEMA. The said proceedings were challenged in the aforesaid matter and the observations of the Supreme Court in the said matter in paras 6, 7 and 8 may be reproduced for ready reference:

"To deny her that right on the ground that after twenty years the challenge to the order of detention could not be revived was unjust and improper. Since, there had been no adjudication on the merits of the order of detention by the High Court, though the order had been challenged, the High Court ought to have gone into the question of validity of the order of detention, since the existence of such an order was the sine qua non for initiating proceedings under SAFEMA. The order of detention had been challenged and that challenge was not unsuccessful on merits.

A three-Judge Bench of this Court in Competent Authority, Ahmedabad v. Amritlal Chandmal Jain (Cri.Appeal No.2/94 with Civil Appeal no.1487/94 and Criminal Appeal No.574/94) (reported in 1998 AIR SCW 1953) considered a somewhat identical situation and opined at p. 1957 of AIR SCW):

"Once the detenu is released during pendency of his writ of habeas corpus by the detaining authority it cannot always be said that writ petition had become infructuous and that the grounds on which the order of detention become invalid. But then if the Court refuses or itself does not go into the merit of controversy in writ of habeas corpus when detenu is released the detenu on that account cannot be made to suffer holding that he did not successfully challenge his order of detention. That is exactly what has happened in this case. Writ petition 1342/92 came to be disposed of on July 10-, 1985. This writ petition along with others was being heard together. This Court did not go into the question of validity of the order of detention but disposed of the matter on account of the fact that detenu had already been released from his detention. We, therefore, cannot say that

challenge to the order of detention by Amritlal was unsuccessful and that he or his relatives or his associates were in any way debarred from challenging the order of detention subsequently when notices under SAFEMA were issued to them.

The view expressed by the three-Judge Bench in Amritlal Chandmal Jain's case (1998 AIR SCW 1953) (supra) leads enough support to the view taken by us."

23. It is pertinent to note that in the said decision also the Supreme Court did not go into factual merit of the order of detention since it was revoked when the petition was pending. Therefore, it was held that a substantive petition could be filed thereafter also and it would not be barred by the principles of res judicata.

24. In the case of Competent Authority v. Amritlal Chandmal Jain, reported in (1998) 5 SCC 615, it has been observed that mere release of the petitioner would not necessarily render the petition infructuous. However, if the legality and validity of the detention order are not gone into, then, the detenu cannot be made to suffer and there would not be any bar to challenge the detention order by the affected persons when proceedings under SAFEMA have been undertaken under section 6 of the said Act. However, it has been made clear that if the detention order has not been challenged, then it cannot be challenged when the proceedings under SAFEMA have been proceeded.

25. In the second case we find that the detention order had already been challenged by the detenu as said hereinabove. However, the said petition came to an end because the detention order was revoked or withdrawn by the competent authority. When the said order was revoked, the detenu would not be interested in prosecuting his petition. The petition was not withdrawn. It came to be dismissed by an order of the court without touching the factual merit of the case. Therefore, the aforesaid decision will not come to rescue the petitioner in arguing that the earlier petition was disposed of and second petition would not be tenable. When a detention order has not been challenged, it cannot be challenged when the proceedings under SAFEMA have been commenced. Same view was taken in the case of Kesar Devi v. Union of India & Ors, reported in (2003) 7 SCC 427. Therefore, it would not be very much necessary to refer the said principle and reiterate it which would amount to repetition of the observation made in (1998) 5 SCC 615

(supra).

26. In 2001 (3) GLR 2415 in the case of Kantilal Damodardas Shah v. Union of India, the Division Bench of this Court held that when the petition challenging the order of detention has been dismissed, then, the detention cannot be challenged in a subsequent petition.

27. There cannot be any dispute about the same. However, in the present case, we find that the order of detention was already challenged in Special C.A. No.125/77 but it came to be disposed of without touching the factual merit with a simple observation that on account of pronouncement of Attorney General of India's case (supra) and therefore, the petition did not lie. Therefore, when the said petition was not disposed of on merit, it would not be open to the respondent to say that the second challenge in SAFEMA proceedings cannot be undertaken to challenge the said detention order. On the contrary, in the case of S K Narayan v Indian Institute of Management, reported in 1983 GLH 184, it has been held that if the earlier petition has been disposed of on merit, then the second petition would not lie. At the same time it has been observed that if earlier petition has not been decided on merit but it has been disposed of on some technicality, then the second one will lie. As said above, when the earlier petition was not disposed of on merit, the second petition would not be barred.

28. Learned Addl. Central Government Standing Counsel has also relied upon a decision of this Court in the case of M R Tailor v. Competent Authority, reported in 1997 (2) GLR 1151. There the earlier petition was dismissed on 9.8.1997 on account of the decision in the case of Attorney General of India (supra) (1994) 5 SCC 583. The second petition was filed after a long lapse of time. The factual merits were not considered and the petition came to be dismissed. In the present case we find that so far as the delay is concerned, the said issue will be dealt with hereafter. The fact remains that the earlier petition was not disposed of on merit. In view of the aforesaid decision of the Supreme Court, the second petition would not be barred by disposal of the earlier petition. On this aspect of the case, we may also refer to a decision of the Bombay High Court in the case of Rajesh Hansraj Chopra v. Competent Authority & Ors., reported in 2002 Bom.C.R. (Cri.) 96. There also the order of detention was revoked. Therefore, the point had arisen whether on revocation of the order of detention, substantive petition challenging proceedings under sections 6 and 7 of the SAFEMA can be undertaken. A

contention was raised that since the detention order was revoked on the ground of delay in service and not on the opinion of the Advisory Board and, therefore, it was a valid revocation and the case was covered under section 2(2) of the SAFEMA. There it was observed that the order of revocation was validly made and it had to be given its full effect as provisions of SAFEMA can be invoked only if valid order of detention subsists at time of initiating the proceedings under SAFEMA. Else, no proceedings under that Act can be initiated in the case. Same view was also taken in a subsequent matter being Criminal Writ Petition No.1171/2003 by the High Court of Bombay and there it was revealed that when the order of detention under the COFEPOSA was revoked, then the proceedings under sections 6 and 7 of the SAFEMA could not be undertaken.

29. On this point, we may also consider a decision of the Supreme Court in Criminal Appeal No.1046/97 in the case of Narendra kumar v. Union of India. There the appellant's father was detained on 19.12.1974 on account of an order under section 3 of the COFEPOSA. The said detention order was challenged by the appellant's brother in a writ petition. The father of the appellant was released from detention even before the period of detention was over. Since the detenu was released and the detention order was revoked, the writ petition filed was dismissed by the court holding that the same had become infructuous. There the correctness or merit of the grounds of detention and the validity of the detention order were not adjudicated on merit.

30. After the release of the appellant's father, notice dated 29.5.1979 under section 6(1) of SAFEMA was issued to the father of the applicant. The proceedings were contested unsuccessfully. Even the constitutional validity of the SAFEMA were also challenged. However, in view of the decision of Attorney General of India's case (supra), the constitutional validity of the two enactment was upheld and therefore, the High Court did not go into the correctness of the order of detention. Thereafter, the appellant challenged the order of detention of his father before Delhi High Court because that was the basis of notice under SAFEMA. In that writ petition, the High Court came to the conclusion that in the earlier writ petition the detention having not been successfully challenged by the petitioner, the second petition before the said court was hit by the principles of res judicata. The High Court did not go into the validity of the detention order. Therefore, the matter was taken to the Supreme Court. There the Supreme Court considered the

aforesaid facts situation and following observations were made:

"The facts involved in this case, in our opinion, are now covered by the judgments of this Court in the case of Competent Authority, Ahmedabad v. Amritlal Chandmal, Ahmedabad, reported in 1998 (6) SC 264, Karimaben K Bagad v. State of Gujarat reported in 1998 (6) SCC 264 and in Criminal Appeal Nos. 1024 and 1025/97 decided on 17th February, 2004. It is held in these judgments that if a challenge to the detention order is not decided on merit by the courts in Habeas Corpus writ petition and the said writ petition is dismissed solely on the ground that it had become infructuous that would not preclude the aggrieved party from challenging the detention order in a subsequent writ petition for the purpose of avoiding the proceedings under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976. In the instant case as noticed above neither the writ petition filed by the brother of the appellant before the Punjab & Haryana High Court nor in the petition before this Hon'ble Court the question of validity of the detention order was not considered, therefore, the appellant had to take recourse a fresh writ petition before the Delhi High Court which as stated above came to be dismissed on a technical ground. We think since the proceedings under Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, has very serious consequences the appellant should have an opportunity of establishing the fact that the detention of his father was not in accordance with the law. Therefore, in the interest of justice we think it appropriate that the impugned order of the High Court should be set aside. The matter be remanded back to the High Court for disposal of the writ petition on merits.

For the reasons stated above this appeal is allowed and the matter will now be remanded to the High Court for disposal in accordance with law."

31. On the strength of the aforesaid latest pronouncement of the Hon'ble Supreme Court dated 24.2.2004, it is very clear that when the earlier proceedings were not decided on factual merit, then the

persons against whom the proceedings under sections 6 and 7 of the SAFEMA have been undertaken would be at liberty to challenge the order of detention also. So the clear and legal position would be as under:

- i. If the detention order has not been challenged during its life time, it cannot be subsequently challenged when proceeding under section 6(1) of SAFEMA have been undertaken.
- ii. If the order of detention has been challenged unsuccessfully then it cannot be challenged again when the proceeding under section 6(1) of SAFEMA has been commenced.
- iii. If a detention order has been challenged but the petition has not been disposed of on merit, but on some technicality like pronouncement of the decision in the case of Attorney General of India (supra), then the second petition challenging the proceedings under SAFEMA and incidently challenging the order of detention would be maintainable.

32. These are the observations which one can gather from the pronouncement of the aforesaid decisions. In other words, I am of the view that in the present matter, the earlier petition of the detenu was not disposed of on merit but it was disposed of simply on pronouncement of the Attorney General of India's case (supra) and since earlier petition was not disposed of on merit, the petitioner of the second petition would be at liberty to challenge the order of detention when proceeding under SAFEMA has been undertaken and which has also been challenged in this petition.

33. As said hereinabove, the order of detention was revoked or withdrawn during the pendency of the said detention period itself. It is not much in dispute that the detenu would have undergone detention for a full period of 12 years, had the order of detention not been revoked, cancelled or quashed. Here it is a fact that the detention order was passed in 1975 and it came to be revoked within a period of two years or less. Therefore, the detenu was not required to undergo the full term of 12 years in detention. Thereafter in the meantime, the detention order was already revoked. The detenu had no interest in challenging the order of detention. However, the proceedings under SAFEMA had commenced against the petitioners and, therefore, the petitioners were required to challenge the said order of detention. These facts go

to say that the challenge to the order of detention in the present petition would not be barred on account of earlier pronouncement of this Court dismissing the petition of the detenu as referred to hereinabove. It is, therefore, clear that when the proceedings under SAFEMA have been commenced under section 6(1) of the Act, the order of detention was not in existence against the detenu since it had already been revoked. In that view of the matter, when the proceedings under section 6(1) of SAFEMA are required to be based on orders of SAFEMA and when the detention order was not in existence, then in my opinion, the proceedings under SAFEMA could not have been undertaken against the detenu since it had already been revoked. In that view of the matter when the proceedings under section 6(1) of SAFEMA are required to be based on orders of SAFEMA and when the detention order was not in existence, nor it lasted for its term unchallenged, then in my opinion, the proceedings under SAFEMA could not have been undertaken against the detenu. Therefore, the notice under section 6(1) and 7 of SAFEMA both have to be treated to be illegal.

34. It has then been contended by the learned Addl. Central Govt. Standing Counsel for Union of India that the widow of the deceased had already preferred appeal before the tribunal and the said appeal is pending. There is no serious dispute about the same.

35. It is true that ordinarily, when an alternative efficacious remedy is available, writ jurisdiction would not be entertainable by this Court. In this aspect of the case, learned Addl. Standing Counsel has relied upon certain pronouncement also. In the case of Gujarat Electricity Board v. N P Sinha reported in 2000 (4) GLR 3070, it has been laid down that a writ of certiorari may not be issued when alternative remedy is available. Same is the view adopted in the case of P V Kulkarni v. L I C reported in 2000 (3) GLH 383.

36. In the present case, we find that the said appeal would be dealt with and decided on its on factual merits. The contentions raised before this court appear to be different from the contentions of the appellant in the aforesaid appeal. This court may not be required to touch the factual merits of the proceedings under SAFEMA. The main base and foundation of the present petition is the revocation of the detention order by the appropriate authority before the expiry of the period which is made as statutory requirement. In the present case we find that the present petitioners have challenged the orders in the proceedings under SAFEMA on the basis that the

detention order was not in existence at the relevant point of time. Simultaneously, the petitioners have also challenged the order of detention on the grounds mentioned hereinabove. Therefore, the factual merits of the proceedings under SAFEMA are not in picture in this petition. Therefore, when the grounds are not the same, it would not be open to the respondents to argue that the present petition is not maintainable when the appeal of the petitioner is pending before the appellate authority. Even otherwise, it is difficult to understand what is the factual dispute before the appellate authority. It is, therefore, not possible to say if the factual dispute in this petition and in the appeal are the same or not. Therefore it would not be possible for this Court to agree with the contention of Mr Barot that since the appeal is pending, the present petition would not lie. As said earlier, the petitioners have challenged the order of detention also on various grounds. So far as the tribunal is concerned, it would decide the matter on factual merits but it may not be possible for the tribunal to decide the legality and validity of the order of detention. Therefore, the order of detention can be challenged by the petitioner only by filing petition and, therefore, pendency of an appeal or disposal of the first petition would not be a bar to the present petitioner. Even in the case of N D Choksi v. Union of India, reported in 1992 GLR 891, it has been laid down that when there is no valid detention order under the COFEPOSA, proceedings under SAFEMA cannot be undertaken.

37. It is also required to be considered that while dealing with the said issue, this Court also observed in the said matter that cancellation of a detention order and quashing of a detention order have equal effect. However, the difference is that a second order of detention under section 11 (2) could be passed if the first order is revoked under section 11 (1). On the other hand, if the order of detention is quashed by order of the High Court, then the authority could not pass a second order under section 11 (2) of the said Act.

38. The learned Addl.Standing Counsel as well as the learned Government Pleader have also argued that the petition has been filed after a long lapse of time and therefore, the petition is barred by principle of delay. It is true that the present petition has been filed as late as in 1999. This fact cannot be disputed. However, it is required to be considered here that the proceedings under section 6(1) of SAFEMA had commenced in 1995 and the order was passed by the competent authority under section 7 of the SAFEMA on 29.6.1998. Therefore, the

date of order passed under section 7 of SAFEMA is required to be considered.

39. In view of the fact that the order under SAFEMA was passed only at the end of June, 1998, the petition challenging the said order filed in 1999 cannot be treated to be a petition which has been filed after a long lapse of time. Therefore, the ground of delay would not be available to the respondents.

In the present case, we find that the detention order issued against the detenu had also been challenged on the ground that the notice under section 6(1) and the order passed under section 7 of SAFEMA respectively, have been based on the order of detention against the detenu. That the petitioners were not parties to the order of detention. That yet copy of the detention order was not supplied to the petitioners and, therefore, the petitioners were not in a position to represent their case either in response to the notice under section 6 of SAFEMA or in the appeal filed by the first petitioner. Therefore, the notice under section 6(1) and the order under section 7 of SAFEMA are both illegal.

40. It is not much in dispute that the proceeding under section 6(1) of SAFEMA was initiated on the basis of the detention order against the detenu. The petitioners were not parties to the said order of detention. The petitioners were not aware about the contents of the order of detention. They were also not aware about the grounds of detention order. Therefore, it was difficult on the part of the petitioners to deal with notice under section 6(1) and thus they approached the competent authority.

41. It has been contended by the learned Sr.Counsel for the petitioner that before passing an order of detention, the grounds for passing such an order were not formulated by the detaining authority. It is well settled that during the period when the Emergency was in force the detenus were not entitled to know the grounds for detention. (1992 (2) GLR 891). Here it has been contended that during the enforcement of emergency, grounds of the detention may not be communicated to the detenu. Nevertheless the grounds for detention were required to be formulated for passing the order of detention.

42. On this point, learned Sr.Counsel for the petitioner has relied upon a decision of this Court rendered in the case of N D Chokshi v. Union of India,

reported in 1992 (2) GLR 891. The relevant observations can be gathered from paras 16 and 17 of the said decision wherein after referring to certain decisions of the Supreme Court particularly the case of State of Bombay v. Atmaram Shridhar Vaidya, reported in AIR 1951 SC 157 and the case of Naresh Chandra Ganguly v. State of West Bengal, reported in AIR 1959 SC 1335, this court had observed that looking to the said decisions rendered by the Supreme Court and also by this Court, it is by now conclusively settled that the grounds of detention must be in existence on the date on which the orders of detention are being passed. It has been laid down in a decision of this court in the case of Parshottam D chunara v. State of Gujarat, reported in 1988 (1) GLR 342 that if the grounds of detention were to be formulated subsequently the order of detention would be bad in law. Therefore, in the aforesaid decisions, this court has found that though grounds may not be supplied to the detenu and though the detenu may not be entitled to have the grounds of detention with him, nevertheless, the grounds of detention were required to be formulated even when the Emergency was in force. In other words, non-existence of the grounds of detention at the time when the detention order was passed, would be fatal to the detention order.

43. It is required to be considered that existence of grounds of detention would mean existence of grounds even on paper. Therefore, mere presence of grounds of detention in the minds of the detaining authority is not sufficient when the grounds are required to be formulated. They have to be formulated on paper and unless the grounds have been formulated, order of detention cannot be sustained in the eye of law.

44. In the present case, we find that it is not the case of the detaining authority that grounds of detention were formulated while passing the order of detention against the detenu. Since the order was passed when the Emergency was in force, the detenu was not entitled to know the grounds of detention. Nevertheless, it was the duty of the detaining authority to formulate the grounds of detention which has not been done in the present case. Therefore, the order of detention in absence of formulation of the grounds for detention cannot be sustained in the eye of law. In other words, the order of detention would fall on the ground that the grounds of detention were not formulated when the said order was passed.

45. Even in the case of Vinod v. Union of India in

Special Criminal Application No.447/89 dated 1.3.1990, this court had taken a similar view. There it was contended by the petitioners therein that the detaining authority had not formulated grounds when the order of detention was passed against the first petitioner under COFEPOSA. The said ground was taken up during the course of argument also. There also this Court had taken into consideration certain decisions of the Supreme Court and had observed that all these judgments support the contentions raised on behalf of the petitioner that the grounds of detention must be formulated before passing the order of detention and failure to do so renders the order void ab-initio. Therefore, even this court has consistently held that there must be existence of grounds on the date when the order of detention may be passed. It is consistently held by this court that absence of existence of grounds of detention at the time of passing the order of detention would render the order invalid or void ab-initio.

46. In the present case, it has been contended that when the order of detention was passed against the detenu, the grounds were not formulated and therefore, they were not in existence. It is not the case of the respondents that the grounds were there and they were on record along with relevant materials. In absence of any such defence on the part of the respondents, it has to be accepted that in the present case an order of detention was passed without formulating and recording the grounds of detention. Consequently, the facts in the present petition are on par with the facts of the petitions referred to hereinabove. When the facts are identical, it would be necessary to follow the principles laid down by this court in earlier matters referred to hereinabove and I respectfully follow the principles enunciated in earlier matter referred to hereinabove and also find that in absence of formulation of grounds of detention, the order of detention cannot be sustained in eye of law. Therefore, the order of detention has to be held to be illegal on this ground. Again when the order of detention is illegal, the proceedings under SAFEMA under section 6(1) of the Act and consequent order under section 7 of the said Act would also be required to be treated to be illegal.

47. The petitioners have also contended that after the emergency was lifted, the grounds of detention were required to be supplied to the detenu and they were not supplied after the Emergency was lifted. Other contentions referred to hereinabove have also been raised on behalf of the petitioners. However, when the order of

detention is found to be illegal on the ground of absence of formulation of grounds and that the proceedings under SAFEMA are not found to be in accordance with law as discussed hereinabove, it is not necessary to touch the remaining contentions raised in the petition.

48. In above view of the matter, the order of detention cannot be sustained in the eye of law and consequently and independently the proceedings under SAFEMA in general, notice under section 6(1) of the Act and consequent order under section 7 of the said Act are also illegal and, therefore, they are required to be quashed and set aside by allowing the present petition.

49. For the foregoing reasons, the present petition is allowed. The impugned order of detention dated 25.8.1975 passed under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 against deceased detenu-Hemantbhai Rambhai Madam placed at Annexure 'A' and notice under section 6(1) of the Smuggling and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 placed at Annexure 'D' and the order passed under section 7 of that Act dated 29.6.1998 at Annexure 'E' to the petition are hereby quashed and set aside. Rule is made absolute to the aforesaid extent. No order as to costs. D.S. permitted.

At this stage, the learned Addl.Standing Counsel has submitted that the petitioners may be directed to maintain status quo with respect to the property in question for a period of eight weeks with a view to enable the respondents to take out appropriate action against the above order. After hearing, it is directed that the petitioners shall maintain satus-quo, as on today, in respect of the subject matter of the petition for a period of four weeks from today.

[D P Buch, J.]

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